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NO. 1[redacted] 114

In the Supreme Court of the United States

OCTOBER TERM, 1941

J. T. McCARTHY, JR., Doing Business as Hercules Supply Company, and G. L. MEHOLIN,
Petitioners,

VERSUS

H. C. WYNNE, and AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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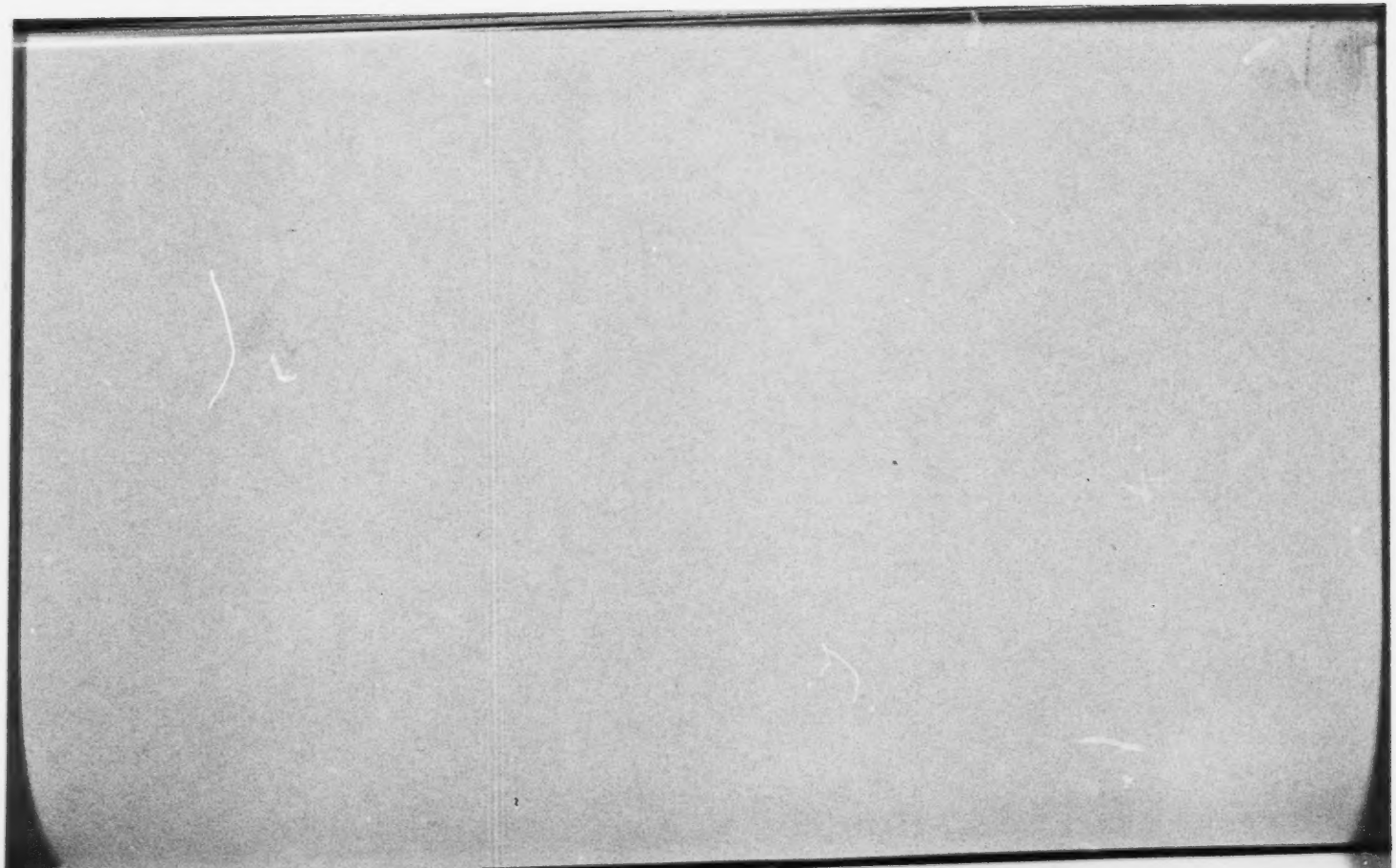
June, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.



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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

Inasmuch as the record is in two volumes, a special statement with respect to their identification for reference purposes is required. The larger of the two volumes, marked "Exhibit 100," is the transcript of the record on first appeal of this case to the Circuit Court of Appeals for the Tenth Circuit. Because of having been introduced in evidence in its entirety at the trial following the first ap-

peal, and because of containing parts of the record of the case material to the second appeal, it became a part of the record on second appeal. By stipulation of counsel and with the consent of the Circuit Court of Appeals and of this Court, this volume has not been reprinted and remains in its original form. It will be referred to as "OR," indicating Original Record. The second or smaller volume, bearing case No. 2377, is that part of the transcript of the record on second appeal which includes all proceedings in the case subsequent to first appeal. It will be referred to as "NR," indicating New Record. This designation was adopted by both parties in the court below.

H. C. Wynne, as plaintiff, seeking to enforce an express written contract, brought this suit against J. T. McCarthy, Jr., doing business as Hercules Supply Company, as defendant, for an equitable accounting for merchandise delivered to McCarthy pursuant to the contract and for a judgment, not in a sum certain, but in such amount as should be determined from such accounting to be due plaintiff under the contract. The suit was originally filed (OR 1) in the State District Court of Oklahoma County, Oklahoma, and was later removed (OR 19) to the United States District Court for the Western District of Oklahoma, where it was docketed as a suit in equity. (Original Petition OR 1-11; amendments made prior to first appeal OR 26-29. The petition as amended and in a more convenient composite form is set out at NR 223-234.)

McCarthy answered, admitting the contract and the receipt of the merchandise, but in substance alleged, in

addition to other defenses not material here, that he had complied with the contract; that he had paid for all the merchandise that was to have been purchased; and that he had at different times offered to return all consigned merchandise remaining on hand. By way of cross-claim McCarthy, himself relying on the written contract and subsequent oral agreements relating thereto, prayed judgment for amounts claimed to be due him (Original answer and cross-petition OR 30-40, and amendments thereto OR 40-44).

Because of the nature of the action and Wynne's theory of recovery, namely, that the accounting in equity based on an express written contract, upon which both parties were relying, the parties stipulated that the case was properly on the equity docket, and being a case properly on the equity docket triable by the Court without a jury, waived a jury and agreed to the reference of the case to a Special Master (NR 8).

In his motion for the appointment of a Special Master, Wynne stated as grounds for the motion (OR 46-47): "This is an action for an accounting in which references are authorized by Federal Rule 59 * * *." In further support of the motion affidavit of counsel for Wynne was attached (OR 47-48), again defining the relief asked to be that of accounting, coupled with the assertion "that this is a suit brought upon a written contract by the terms of which * * *," followed by a statement of the terms of the contract.

Upon the record as thus made and the issues so presented the case was referred to (OR 50) and tried by a Special Master. The case was proceeded with and tried on the theory of an equitable accounting predicated solely upon the enforcement of the terms and provisions of the express written contract. A search of the entire record of the proceedings will fail to disclose wherein the issue of "conversion" was ever contended for, suggested, or even thought of, by either party or by the Master or by the district court prior to the first appeal. Conversion of the property was not in issue. McCarthy was not called upon to meet or to introduce any evidence with respect to the issue of conversion. The suit was upon the contract.

The Master made his findings of fact (OR 57-66) and conclusions of law (OR 66-68) and recommended that judgment be entered in favor of Wynne (OR 68), all based on the contract. Inconsistent with and precluding any thought or claim of conversion he found (Conclusion of Law IV, OR 66), in accord with the contention of Wynne, "that the contract is one of sale of the entire stock of merchandise," thereby passing title to McCarthy, and then, by applying what he determined to be the contract formula for arriving at the sale price, reached the amount of the recommended judgment (OR 68). On the same theory (Conclusion of Law VI, OR 67) the Master denied McCarthy recovery on his cross-petition. Based on the findings of fact and conclusions of law of the Master, except only as to a recalculation of amounts, the district court en-

tered judgment for Wynne in the sum of $5,790.29 (Opinion OR 107-108, decree OR 111-113).

An appeal was taken to the Tenth Circuit Court of Appeals by both parties, resulting in a decision by that Court (*Wynne* v. *McCarthy*, 10th C. C. A., 97 Fed. (2d) 964, May 31, 1938), holding, foreign to any contention of either party, that because an essential element of the contract was left for future agreement of the parties, and since such future agreement was never consummated, the contract never became obligatory on either party and neither party was entitled to the recovery he sought based thereon. The Court proceeded to say that since the contract "to sell" was never consummated, title to the merchandise never passed to McCarthy, and hence Wynne's remedy was that of an action for conversion, or upon an implied contract to pay the value of the merchandise arising out of conversion, rather than an action upon the express contract. The Court did not purport to say when the conversion occurred.

Assessing the costs equally between the parties, the Court directed:

> "Let the judgment be vacated and the cause remanded with instructions to permit Wynne to amend his petition and to proceed further in accordance with this opinion."

The mandate followed the language contained in the Court's opinion (NR 13).

Pursuant to the authority of the mandate, Wynne procured leave (NR 14) and filed his amended petition

(NR 15-16), setting up and stating a simple cause of action at law for a money judgment in a sum certain for conversion.

In due time McCarthy filed an amended answer (NR 16), asserting his defenses to such action for conversion. Within the time prescribed by Rule 38, Federal Rules of Civil Procedure, McCarthy filed his demand for a trial by jury as follows:

> "The above named defendants demand a trial by jury of all issues triable of right by a jury which are raised by plaintiff's petition as amended and the answers of defendants." (NR 23.)

At the pretrial conference the trial court took the position and held that under the opinion of the Circuit Court of Appeals on first appeal, the only issue left in the case was that of the value of the merchandise and, in line with this holding, ordered: (a) That the defendant's answer be stricken; (b) that the further hearing in the case be limited to the value of the property at the time of conversion; and (c) that McCarthy's demand for a jury trial be denied (NR 25-26).

McCarthy thereupon filed an amended answer (NR 27) in the form of a general denial, being in substance the only answer that could be filed under the order of the Court.

A trial of the case limited to the sole issue of the value of the merchandise was had by the Court without a jury (NR 39-40) resulting in a judgment for Wynne in the sum of $13,150.95, with interest at the rate of 6% per annum

from February 15, 1925 (NR 29-30). Although there had never been any finding or determination prior to such time as to when the alleged conversion occurred, the Court, without evidence of that fact, assumed that it occurred at the time it was alleged by plaintiff to have occurred, namely, in February, 1925, when the goods were first delivered to McCarthy (NR 40-41).

McCarthy took an appeal to the Circuit Court of Appeals, which on February 26, 1942, affirmed the judgment of the district court (NR 179-184). Petition for rehearing was denied on April 14, 1942 (NR 236).

The principal questions involved on said appeal insofar as they are material here were (NR 1-2):

1. Error of the trial court in limiting McCarthy's defenses and the second trial of the case to the one issue of the value of the property.
2. Error because of the denial to McCarthy of a jury trial.

In its opinion (NR 179-184, *McCarthy* v. *Wynne,* 126 Fed. (2d) 620), the Circuit Court of Appeals in substance held: That its opinion on first appeal amounted to an adjudication of the issue of conversion; that the effect of its mandate was to limit the further trial of the case to the one issue of the value of the property at the time of the conversion; and that the agreement waiving a jury at the time of the first trial was binding upon the parties throughout the entire litigation.

Statements by counsel for Wynne, with respect to the variance in the issues before and after the first appeal and

asserting that conversion was not an issue prior to the first appeal are set out in the Record at NR 202-205.

There is no controversy between any of the other parties to the action separate and apart from the controversy between Wynne and McCarthy, hence no special mention need be made of such other parties.

II.
STATEMENT OF BASIS OF JURISDICTION

It is believed that the jurisdiction of this Court to review the judgment in question is sustained by:

Section 240 of the Judicial Code as amended (Title 28, Sec. 347, subd. (a), U. S. C. A);

Rule 38, Section 5, subsec. (b), of the Rules of this Court as amended; and

The cases of *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188;

Demick v. *Schiedt*, 293 U. S. 474, 55 S. Ct. 296, 79 L. ed. 603;

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879, in which writs of certiorari to Circuit Courts of Appeals were entertained by this Court to review action by the courts below denying or limiting the right of trial or curtailing the right of trial by jury.

The reasons why under said Rule 38 aforesaid this Court has jurisdiction are set out under heading IV of this petition, entitled, "Reasons Relied on For the Issuance of Writ."

Date of the judgment sought to be reviewed is February 26, 1942 (NR 184). A petition for rehearing was denied on April 14, 1942 (NR 101).

III.
QUESTIONS INVOLVED

(1) The correctness of the decision of the court below holding that under its former opinion and mandate the trial court properly limited McCarthy's defenses and the second trial to the single issue of the value of the property at the time of the alleged conversion.

(2) The correctness of the decision of the court below holding that McCarthy was not entitled to a trial by jury on such second trial.

IV.
REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

1. In holding that the trial court correctly limited petitioner's defenses and the trial to the single issue of the value of the property, the Circuit Court of Appeals decided an important question of Federal law of procedure in the Federal Courts in a way probably in conflict with the applicable decisions of this Court and the Circuit Courts of Appeals for other Circuits, including the cases of:

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879;

Gasoline Products Co. v. *Champlin Refining Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188;

Hodges v. *Easton*, 106 U. S. 408, 1 S. Ct. 307, 27 L. ed. 169;

Indemnity Ins. Co. of North America v. *Levering* (9th C. C. A.), 59 Fed. (2d) 719;

McKeon v. *Central Stamping Co.* (3rd C. C. A.), 264 Fed. 385.

2. In holding that the effect of its mandate on first appeal was to limit further proceedings to the issue of the amount of damages, the Circuit Court of Appeals decided an important question of Federal law and of the procedure in the Federal Courts in a way probably in conflict with the decisions of the Circuit Courts of Appeals for other Circuits, including the cases of:

Indemnity Ins. Co. of North America v. *Levering* (9th C. C. A.), 59 Fed. (2d) 719;

Millers Mutual Fire Ins. Assn. v. *Bell* (8th C. C. A.), 99 Fed. (2d) 289;

McNee v. *Williams* (8th C. C. A.), 280 Fed. 95.

3. In holding that the agreement waiving a jury trial at the time of the first trial was binding upon the parties on second trial, the Circuit Court of Appeals decided an important question, not only of Federal law and procedure, but of general law, in a way probably in conflict with the decisions of the Circuit Courts of Appeals for other Circuits and the overwhelming weight of authority, including the cases of:

Burnham v. *North Chicago Street Ry. Co.* (7th C. C. A.), 88 Fed. 627, 628;

F. M. Davis & Co. v. *Porter* (8th C. C. A.), 248 Fed. 397.

4. The denial to petitioner by the lower court of the right to interpose his defenses to the amended petition alleging for the first time a conversion of the merchandise on February 10, 1925, the limiting of the trial to the sole issue of the value of the property, and the denial of petitioner's request for a jury, sanctioned by the decision of the Circuit Court of Appeals affirming the judgment of the lower court, is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 2377, J. T. McCarthy, Jr., doing business as Hercules Supply Company, and G. L. Meholin, Appellants, vs. H. C. Wynne, and American Exchange Bank of Henryetta, Oklahoma, Appellees, and that said judgment of the said United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Court, and that your petitioners be granted such other and further relief in the premises as to this Court seem meet and proper.

Dated at Oklahoma City, Oklahoma, this 1st day of June, 1942.

J. T. McCarthy, Jr., Doing Business as Hercules Supply Company, and

G. L. Meholin,

By JOHN H. MILEY,
1039 First National Building,
Oklahoma City, Oklahoma,
Counsel for Petitioners.

ROBERT M. WILLIAMS,
Of Counsel.

June, 1942.

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H. C. WYNNE, and AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT

The opinion of the Circuit Court of Appeals sought to be reviewed is reported in *McCarthy* v. *Wynne*, 126 Fed. (2d) 620, and shown in the record (NR 179-184).

The opinion of the same Court on first appeal of the case is reported in *Wynne* v. *McCarthy*, ~~99~~ 97 Fed. (2d) 964.

II.

JURISDICTION

A full statement of the grounds on which the jurisdiction of this Court is invoked has been made in the petition under headings II and IV, and in the interest of brevity such statement is not repeated here.

III.
STATEMENT OF THE CASE

A concise statement of the case containing all that is material to consideration of the questions presented, with appropriate page references to the printed record, has been made in the petition under heading I, which statement is hereby adopted and made a part of this brief.

IV.
ASSIGNMENTS OF ERRORS

1. The court erred in its decision holding that under its former opinion and mandate the trial court properly limited McCarthy's defenses and the second trial to the single issues of the value of the property at the time of the alleged conversion.

2. The court erred in its decision holding that McCarthy was not entitled to a trial by jury on such second trial.

V.
ARGUMENT

Synopsis of Argument

In support of the errors assigned, petitioners assert and rely upon the following propositions, which will be presented and considered in order.

Proposition I.

Petitioner McCarthy was entitlled to a new trial *in toto.*

Point A. The action was one at law.

Point B. Being an action at law, it could only be proceeded with as law action, regardless of prior status in in equity.

Point C. Wynne's remedy having been determined to be that of action at law, McCarthy was entitled to the rights guaranteed to him in a law action, namely, a new trial of all issues, including a trial by jury.

Point D. This case not within the exception permitting limitation of new trial in law actions to single issue of damages.

Point E. Effect of mandate on first appeal was not to direct that the further proceedings be limited to the single issue of damages.

Point F. The Circuit Court of Appeals could not have remanded the case with leave to Wynne to amend his pleadings without granting to McCarthy the right to interpose his defenses.

Proposition II.

Not only was McCarthy entitled to a new trial, he was entitled to a trial by jury.

Proposition 1.

Petitioner McCarthy was entitled to a new trial *in toto*.

Point A: The action was one at law.

On first appeal Wynne's remedy was determined to be an action for conversion or on implied contract arising out of conversion. Pursuant thereto, he amended his petition (NR 15-16), alleging conversion of the property on Febru-

ary 10, 1925, and seeking only a money judgment for its value. The action was one at law. His remedy at law was plain, speedy, and adequate.

Declaratory of the law with respect to cases of equity jurisdiction as distinguished from actions at law, as pointed out in the cases hereinafter cited, Section 267 of the Judicial Code (Sec. 384, Title 28, U. S. C. A.) states the rule to be:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

This Court in the case of *United States* v. *Bitter Root Development Company*, 200 U. S. 451, 26 S. Ct. 318, 50 L. ed. 550, has definitely established that an action for conversion or on an implied contract arising out of conversion, such as here involved, is one at law.

Other cases particularly applicable are:

Buzard v. *Houston*, 119 U. S. 347, 7 S. Ct. 249, 30 L. ed. 451.

Parkerson v. *Borst* (5th Cir.), 251 Fed. 242.

Cecil Natl. Bank v. *Thurber* (4th Cir.), 59 Fed. 913.

South Penn Oil Co. v. *Miller* (4th Cir.), 175 Fed. 729.

Whitehead v. *Shattuck*, 138 U. S. 146, 11 S. Ct. 276, 34 L. ed. 873.

Investors Guaranty Corp. v. *Luikart* (8th Cir.), 5 Fed. (2d) 793.

Curriden v. *Middleton*, 232 U. S. 633, 34 S. Ct. 458, 58 L. ed. 765.

Wood v. *Phillips* (4th Cir.), 50 Fed. (2d) 714.

If the Circuit Court of Appeals in its opinion (NR 179-184 at 183; 126 Fed. (2d) 620 at 623) intended to say that because an "action on assumpsit or implied contract for goods had and received is a remedy which is equitable in origin and character," the instant action is a suit in equity and should be proceeded with as such, rather than as an action at law, it is greatly in error and thus announces a doctrine contrary to the authorities above cited, including decisions by this Court. The authorities thus cited, including cases referring specifically to actions in assumpsit, are replete with statements that although a cause of action involves equitable features and includes allegations of elements falling under the head of chancery jurisdiction, nevertheless if the remedy by pecuniary judgment is complete the action must be regarded as one at law because of the defendant's constitutional right of a trial by jury in such cases.

The case of *Stone* v. *White*, 301 U. S. 532, 57 S. Ct. 851, 81 L. ed. 1265, cited by the Court below in support of the statement that the remedy of assumpsit or for money had and received is equitable in its origin and nature, is careful to make it clear that although equitable in origin and having equitable features, such remedy constitutes "an action at law."

Neither can it be assumed that the petition in this case as amended following the first appeal is in the nature of an action of assumpsit based on implied contract, rather than *in tort* for conversion. It simply alleges (NR 15-16) that McCarthy was guilty of conversion and by reason of the conversion became liable and bound to pay the plaintiff

the reasonable value of the property at the time of the conversion, and prays judgment by reason thereof. Whether the action be for tort or on implied contract, it is nevertheless an action at law, hence we do not attempt to more definitely classify it as being a tort action rather than in assumpsit.

Point B: Being an action at law, it could only be proceeded with as a law action, regardless of prior status in equity.

Regardless of the nature of the action prior to first appeal, whether a suit in equity or an action at law, when on appeal it was determined that Wynne could not prevail on the theory of the first judgment, namely, that of a recovery in accounting based on the express contract, but that his remedy was at law for conversion or on implied contract arising out of conversion, and the judgment was vacated and Wynne given leave to amend his petition, which he did, the action could only be proceeded with as an action at law in accordance with the rights guaranteed to the parties in actions at law.

If a law action in the first instance, it of course would continue as a law action.

If an equity action in the first instance, equity lost jurisdiction and further proceedings and all rights of the parties would be those applicable to actions at law. See:

Toucey v. *New York Life Ins. Co.* (8th Cir.), 102 Fed. (2d) 16.

American Falls Milling Co. v. *Standard Brokerage & Distributing Co.* (8th Cir.), 248 Fed. 487.

Mitchell v. *Dowell*, 105 U. S. 430, 26 L. ed. 1142.

Diamond Alkali Co. v. *Tomson* (3rd Cir.), 35 Fed. (2d) 117.

Wood v. *Phillips* (4th Cir.), 50 Fed. (2d) 714.

Glauber v. *Agee Dept. Stores* (D. C. W. D., Ky.), 1 Fed. Rules Dec. 137.

Lewis Publ. Co. v. *Wyman* (Mo., D. C.), 168 Fed. 756.

Brauer v. *Laughlin*, 235 Ill. 265, 85 N. E. 283.

Wasatch Oil Ref. Co. v. *Wade*, 92 Utah 50, 63 Pac. (2d) 1070.

Reynolds v. *Warner*, 125 Neb. 304, 258 N. W. 462.

Booneville Natl. Bank v. *Blakey*, 166 Ind. 427, 76 N. E. 529.

The reason for the rule, as pointed out in the authorities cited, is the right of the defendant to a particular kind of a trial in a law action, including a trial by jury guaranteed by the Seventh Amendment to the United States Constitution—a right which cannot be denied to the defendant merely because a plaintiff attempts in the first instance to maintain his action as a suit in equity.

So strict was the rule guaranteeing to the defendant his rights in an action at law under the Constitution that prior to the adoption of Federal Equity Rule No. 22 a plaintiff, misconceiving his remedy and filing his action in the nature of a suit in equity, could not proceed further in the same action after it was determined that his remedy was in fact at law. It was necessary that he dismiss and refile the action as an action at law.

With the adoption of Federal Equity Rule 22 it was no longer necessary that the suit be refiled but that "if at any time it should appear that a suit commenced in equity should have been brought as an action on the law side of the court," as in this case, "it shall be forthwith transferred to the law side and be there proceeded with * * *"

With the adoption of the new Federal Rules of Civil Procedure abolishing the two divisions of the Court, which became effective at the time this case was remanded, a motion to transfer the case from the equity side of the docket to the law side was no longer appropriate, but nevertheless the Court was called upon, without such a motion, to recognize the remedial rights of the defendant growing out of the fact that the suit was in fact a law action as distinguished from its previous purported equitable status. It is the established rule that although the procedural distinctions between actions at law and in equity have been abolished, the distinction between legal and equitable remedies still exists.

Williams v. *Collier*, 32 Fed. Sup. 321, D. C. E. D. Pa.

Grauman v. *City Company of New York*, 31 Fed. Sup. 172.

Bellevance v. *Plastic-Craft Novelty Co.*, 30 Fed. Sup. 37.

Fitzpatrick v. *Sun Life Assurance Co.*, 1 Fed. Rules Dec. 713.

Moore's Federal Practice, Vol. 1, p. 196.

The demand by the defendant McCarthy for a jury

trial (NR 23), a right existent only in an action at law, performed the same function as would a motion to transfer the case from the equity to the law side of the docket, in that it definitely called the Court's attention to the demand of the defendant that the case be treated as a law action. The demand for a jury trial was filed at the earliest opportunity, following the determination by the Circuit Court of Appeals on first appeal that Wynne was not entitled to the relief originally sought and granted, and following the change in the form of the action evidenced by the amendment to the petition to state a cause of action in conversion.

Point C: Wynne's remedy having been determined to be that of an action at law, McCarthy was entitled to the rights guaranteed to him in law actions namely, a new trial of all issues, including a trial by jury.

When on appeal the judgment following the first trial was vacated, there was no longer a judgment against McCarthy. It being determined that Wynne's remedy was an action at law for conversion or upon implied contract arising out of conversion, another judgment could only be entered against McCarthy in accordance with the practices and guarantees applicable to law actions, namely, the right to a new trial by a jury of all facts and issues necessarily determinable under the pleadings to support such judgment.

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879.

Indemnity Insurance Co. v. *Levering* (9th Cir.), 59 Fed. (2d) 719.

Gasoline Products Co. v. *Champlin Refg. Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188.

Shell Petroleum Corp. v. *Shore* (10th Cir.), 80 Fed. (2d) 785.

Illinois Power & Light Corp. v. *Hurley* (8th Cir.), 49 Fed. (2d) 681.

Hodges v. *Easton*, 106 U. S. 408, 1 S. Ct. 307, 27 L. ed. 169.

McKeon v. *Central Stamping Co.* (3rd Cir.), 264 Fed. 385.

Great American Ins. Co. v. *Johnson* (4th Cir.), 27 Fed. (2d) 71.

Millers Mutual Fire Ins. Assn. v. *Bell* (8th Cir.), 99 Fed. (2d) 289.

The action of the trial court in this case, denying to McCarthy a new trial of all issues and overruling the demand for a jury trial, sanctioned in its opinion by the Circuit Court of Appeals, was to deny McCarthy the guaranty of the Seventh Amendment to the Constitution of the United States and is in conflict with the foregoing decisions of this Court and of other Circuit Courts of Appeals.

Point D: This case not within the exception permitting limitation of new trial in law actions to single issue of damages.

The court below in its opinion (NR 179-184 at 183, 126 Fed. (2d) 620 at 623) attempts to justify the limiting of the second trial to the single issue of damages on two grounds.

First. The Court says the action was justified because in equity it is a proper practice to limit further hearings to a specific issue or issues citing equity cases.

It has already been pointed out herein that when it was determined on appeal Wynne was not entitled to relief in equity based on the written contract, which he first sought, and that his remedy was in fact an action at law for conversion or on implied contract arising out of conversion, the action could only be proceeded with as one at law and not one in equity. Furthermore, as will be pointed out under Point E, the Court did not in its first opinion or mandate direct that the further proceedings be limited to any specific issue or issues. It vacated the judgment in its entirety, granted leave to Wynne to amend his petition without limitation, and in general terms directed that he be permitted to proceed in accordance with the opinion (NR 13).

Second. The Court says in its opinion that, if the action be regarded as one at law, the action of the lower court was justified by the exception to the general rule which in certain instances permits in law actions the limitation of a second trial to the issue of damages, citing the cases of:

Gasoline Products Co. v. *Champlin Refg. Co.*, 283 U. S. 494, 51 S. Ct. 513, 75 L. ed. 1188.

May Dept. Stores Co. v. *Bell* (8th Cir.), 61 Fed. (2d) 830.

Mutual Life Ins. Co. of New York v. *Sayer* (3rd Cir.), 81 Fed. (2d) 752.

Empire Fuel Co. v. *Lyons* (6th Cir.), 257 Fed. 890.

Other cases recognizing this same exception are:

Massachusetts Bonding & Ins. Co. v. *John R. Thompson Co.* (8th Cir.), 88 Fed. (2d) 825.

Norfolk S. R. Co. v. *Ferebee*, 238 U. S. 269, 35 S. Ct. 781, 59 L. ed. 1303.

City of Orlando v. *Murphy* (5th Cir.), 84 Fed. (2d) 531.

United States v. *Meyer* (3rd Cir.), 76 Fed. (2d) 354.

Cub Fork Coal Co. v. *Fairmount Glass Works* (7th Cir.), 59 Fed. (2d) 539.

The cases cited are illustrative of the exception and its application.

As will be disclosed from a reading of the decisions in the cases cited, such practice is to be exercised sparingly and may not properly be resorted to unless it clearly appears that no injustice can result therefrom. This Court in the case of *Gasoline Products Co.* v. *Champlin Refg. Co.*, *supra*, on certiorari denied the application of the exception to the circumstances there existing. The application of the exception to the instant case would amount to an unreasonable extension of its intended use and would conflict with the principles announced in the foregoing cases.

In each case in which the exception has been allowed and a retrial limited to the single issue of damages, the issue of liability had on the first trial been properly tried and determined, and not disturbed on appeal; the verdict or judgment was challenged on appeal because of the amount of the damages; the verdict or judgment, in most if not in every instance, was vacated and set aside only as to the

element of damage, affirmed as to liability, and the case remanded with specific instructions that only the one issue be tried. Illustrative of the facts and circumstances just enumerated is the order of the court in the case of *Massachusetts Bonding & Insurance Co.* v. *John R. Thompson Co., supra,* in which the mandate of the Court was as follows:

> "The judgment in so far as it constitutes a determination that the surety is liable to the plaintiff upon the bond in suit is affirmed. In so far as the judgment constitutes a determination of the amount for which the surety is liable, it is reversed. The case is remanded, with directions to set aside the findings in so far as they relate to the amount of the surety's liability, and to grant the surety a new trial as to that issue" (88 Fed. (2d) at page 832).

In none of the cases to which our attention has been called was there a change in the pleadings or of any of the issues between the time of the first trial and the second trial. The pleadings and the basis of liability in each case remained the same.

In the instant case the findings of fact (OR 57-66), conclusions of law (OR 66-68), and the judgment (opinion OR 107-108; decree OR 111-113) on first trial were all based on a liability growing out of the enforcement of the express written contract. It was found that the contract (Conclusion of Law IV, OR 66) was "one of sale," passing title to McCarthy, and that the liability of McCarthy was for the "sale price" of the merchandise under the contract, a theory and basis of liability wholly antagonistic to any thought or contention that McCarthy could have converted

the property. A contention that McCarthy was the purchaser and thus the owner of the property and that he was also liable for conversion could not have existed in the same suit.

Merriman v. *Chicago & E. I. R. Co.* (7th Cir.), 64 Fed. 535 at 550.

Shields v. *Barrow*, 17 How. 130, 15 L. ed. 158.

On first appeal McCarthy took issue not only with the amount of the judgment but with the determination of liability. The Circuit Court not only vacated the judgment as to the measure of damages, but also held that because the contract was never consummated relief could not be had based thereon, and thus denied and upset the very theory of liability adopted by the master and the trial court. The judgment was not affirmed in part and vacated in part, as in the cases cited. It was vacated in its entirety. Hence, the issue of liability was not properly tried or determined by the trier of facts on first trial.

The theory and basis of liability upon which the damages were determined on second trial, namely, that of conversion, was not the basis of liability adopted on the first trial. The pleadings had been amended to allege for the first time a conversion on February 10th, 1925. There has never been a judgment by any "trial court" or "jury" in this case based on liability because of conversion, except the judgment following the second trial at which the issue of conversion was not tried.

In the case of *Gasoline Products Co.* v. *Champlin Refg. Co. supra*, this Court said (283 U. S. at page 500) that where the question of damages "is so interwoven with that

of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty" a new trial of all the issues should be had.

In that case the question of the date of the breach of the contract was material to a determination of the damages, and since such date had not been previously determined, this Court in its application of the rule last above stated refused to condone the submission to a jury of the question of damages without submitting the issue of liability because of the breach of the contract.

In the instant case the determination of the damages for conversion was definitely and indistinguishably interwoven with the issue of the date on which the conversion is claimed to have occurred. The Circuit Court of Appeals in its first opinion (97 Fed. (2d) at p. 970) correctly stated the measure of damages for conversion to be the value of the merchandise at the "*time*" of the conversion, coupled with the interest from such "time." Thus, until the date of the conversion was determined the damages could not be determined. Just as in the case of *Gasoline Products Co.* v. *Champlin Refining Co., supra*, the date of the breach of the contract was so interwoven with the issue of damages as to preclude limitation of the retrial to the single issue of damages, so here the previous undetermined issue as to the date of the alleged conversion would preclude any limitation of the retrial to the single issue of damages. In this case there had been no determination of the date of conversion. Neither the Special Master nor the trial court on the first trial, deciding the case and entering judgment

based on the written contract, purported to make any finding in regard thereto. The finding of fact of the Master (No. XIII, OR 64-65), upon which the Circuit Court of Appeals on first appeal relied to support its observation that Wynne's remedy was for conversion, merely recited that at the time of the trial it was impossible from the evidence to find "the amount of materials that was actually sold by the defendant J. T. McCarthy, Jr., by any system of accounting, by reason of the fact that supplies of a similar nature were on hand for sale in the defendant's stores and the materials and supplies shipped under the contract mixed and intermingled with materials and supplies in the defendant's stock of goods, and the goods moved from place to place *during the time that the defendant J. T. McCarthy, Jr., had possession of said materials and supplies.*" It should be borne in mind that in making this finding the Master, taking the position that under the contract title was in McCarthy, was not purporting to make a finding of conversion, nor was he concerned with the date of a possible conversion, but was simply explaining why in applying the contract formula for arriving at the sale price, no accounting could be had of the goods "actually sold by the defendant." There was no determination of the date of the conversion by the Circuit Court of Appeals on appeal. Its mandate and the leave granted Wynne to amend his petition was left open in this respect. Wynne by his amendment to the petition could have alleged that the conversion occurred on December 9, 1930, the date when according to his petition prior to first appeal McCarthy first refused to deliver up possession of the goods (par. 10, OR 29 or NR

230-231), the date in February, 1925, when the goods were first delivered to McCarthy, or any other date "during the time J. T. McCarthy, Jr., had possession of said materials and supplies." Wynne being left free to select a date as being the date of the conversion, McCarthy should have been unrestricted in his right to take issue with such date. This issue could not be determined separate and apart from the issue of conversion itself, and hence McCarthy was entitled to a new trial of all issues.

Point E: Effect of mandate on first appeal was not to direct that the further proceedings be limited to the single issue of damages.

Assuming, but not admitting, that the Court on first appeal had the right to remand the case for a new trial upon the specific issue of damages, such was not the effect of its mandate. The mandates in the various cases cited under Point D expressly and specifically directed that only a partial new trial was to be had and designated the specific issue to be so retried, affirming the judgment otherwise.

If anything short of a new trial of all the issues was intended, the limitation should appear from the mandate.

In the case of *Indemnity Insurance Co. of North America* v. *Levering* (9th Cir.), 59 Fed. (2d) 719, trial was had without a jury, followed by an appeal to the Ninth Circuit Court of Appeals. On appeal the Court entered an order substantially identical with that in the instant case, namely, reversing the judgment and directing the lower

court to proceed in conformity with the decision of the Court. The lower court proceeded to enter a judgment without granting a new trial. The Appellate Court on second appeal said that although it may be possible that on previous appeal it might have limited the new trial to the specific issue raised on such appeal, citing *Gasoline Products Co.* v. *Champlin Refining Co., supra,* but went on further to say that since the mandate did not so direct, the trial court could not give to it that interpretation. The Court said (59 Fed. (2d), at p. 720):

> "This was not done, however. The effect of our order of reversal and mandate thereon was to call for a new trial upon all the issues. The trial was denied by the court and for that reason the judgment must be reversed."

In the case of *Millers Mutual Ins. Assn. of Illinois* v. *Bell* (8th Cir.), 99 Fed. (2d) 289, the Court, construing an almost identical order and mandate, said:

> "The effect of our mandate was to direct the lower court to grant a new trial, but in retrying the case not to make the same error for which the judgment was reversed."

The same opinion contains the following interesting statement with respect to the amendment of pleadings after the reversal of the first judgment:

> "The rule as to amendments to pleadings (See *McAllister* v. *Sloan,* 8 C. I. R., 81 Fed. (2d) 707, 708, 709), upon the retrial of an action at law after a reversal is, we think, the same which applies to amendments to the pleadings upon the first trial of the action. The situation is as though the case had never been tried."

The general rule, as stated in 5 C. J. S., at page 1476, is as follows:

> "The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been entered."

Point F: The Circuit Court of Appeals could not have remanded the case with leave to Wynne to amend his pleadings without granting to McCarthy the right to interpose his defenses.

This proposition needs no argument other than to quote from the case of *Warner* v. *Godfrey*, 186 U. S. 365, 22 S. Ct. 852, 46 L. ed. 1203, wherein it is said:

> "A case cannot be remanded by an appellate court for the purpose of allowing the complainant to amend the bill in order to assert a new and distinct ground of relief, if the defendants are deprived by such mandate of all opportunity to interpose a defense."

Proposition 2.

Not only was McCarthy entitled to a new trial, he was entitled to a trial by jury.

The right to a new trial would ordinarily under the Seventh Amendment to the Constitution of the United States carry with it the right to trial by a jury. See authorities cited under Point C, Proposition 1, of this brief.

Even if the new trial was to be limited to the single issue of damages, the right of trial by jury would extend in any event to such single issue to be retried. See authorities cited under Point D, Proposition 1, of this brief.

The Circuit Court of Appeals in its opinion in this case sanctions the denial by the trial court of McCarthy's demand for a trial by jury on the theory that because the stipulation waiving a jury on the first trial contained other mutual stipulations constituting a consideration therefor, it was binding on the parties throughout the entire litigation, citing *Park* v. *Mighell*, 7 Wash. 304, 35 Pac. 63, and *Raleigh Bank & Trust Co.* v. *Safety Transit Lines*, 200 N. C. 415, 157 S. E. 62. In this, the decision by the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals and with the overwhelming weight of authority. See:

Burnham v. *North Chicago Street R. R. Co.* (7th Cir.), 88 Fed. 627;

F. M. Davies & Co. v. *Porter* (8th Cir.), 248 Fed. 397;

North Pacific R. R. Co. v. *VanDusen* (D. C. Minn.), 34 Fed. (2d) 786;

4 Cyc. of Fed. Proc., p. 874;

Sharrock v. *Kreiger*, 6 I. T. 466, 98 S. W. 161;

Osgood v. *Skinner*, 186 Ill. 491, 57 N. E. 1041;

McGeath v. *Nordberg*, 53 Minn. 235, 55 N. W. 117;

Worthingham v. *Nashville Ry. Co.*, 114 Tenn. 177, 86 S. W. 307;

Cross v. *State*, 78 Ala. 430;

State v. *Fouchet*, 33 La. Ann. 1154;

Dean v. *Sweeny*, 51 Tex. 242;

Brown v. *Chenoworth*, 51 Tex. 469;

Town of Carthage v. *Buckner,* 8 Ill. App. 152;

Schumacher v. *Crane,* 66 Neb. 440, 92 N. W. 609;

Farmers Handy Wagon Co. v. *Casualty Co. of America,* 184 Iowa 773, 167 N. W. 204;

Benbow v. *Robbins,* 72 N. C. 422;

Guyer's Estate v. *Caldwell,* 98 Ill. App. 232;

Cochran v. *Stewart,* 66 Minn. 152, 68 N. W. 972;

White v. *A. C. Houston Lbr. Co.,* 179 Okla. 89, 64 Pac. (2d) 908;

Nashville v. *Foster,* 10 Lea. 351.

We call particular attention to the case of *Burnham* v. *North Chicago Street R. R. Co., supra,* from the Seventh Circuit Court of Appeals, being what appears to be the leading case on the subject. In that case the stipulation waiving a trial by jury was not an ordinary waiver but was a written stipulation signed by both parties, involving mutual stipulations and agreements other than the waiver of the jury trial. The Court in that case said:

"The stipulation to waive a jury, and to try the case before the court, only had relation to the first trial. There could be no presumption then that there would ever be a second trial; and therefore it should not be presumed that the parties, in making the stipulation, had in mind any possible subsequent trial after the first, to which the stipulation could refer. The right of a trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guaranteed by the United States Constitution. A stipulation for the waiver of such right should therefore be

strictly construed in favor of the preservation of the right."

The stipulation waiving a jury involved in the case of *F. M. Davies & Co.* v. *Porter, supra,* was likewise in writing, signed by both parties, and would thus constitute a contract between the parties. The Eighth Circuit Court of Appeals said:

> "It is claimed that, as the first trial was had to the court, a jury having been waived by stipulation in writing, it was error to grant plaintiff's motion to try the cause to a jury. The contention is without merit, as such a stipulation does not affect the right of either party to demand a trial by jury, on a second trial, after the judgment in the first trial has been reversed and remanded for a new trial."

In this case it is clear that the parties entered into the stipulation on the theory that the action was one brought upon the contract upon which both parties were relying. It was further entered into upon the assumption that the suit was properly on the equity docket. The stipulation was made in the light of the pleadings as then drawn.

Several of the cases above cited discuss the matter of an agreement to waive a jury in relation to a subsequent amendment of the pleadings. They all limit the effect of such a contract to a trial of the issues as raised by the pleadings then drawn.

Neither the case of *Park* v. *Mighell, supra,* nor *Raleigh Bank & Trust Co.* v. *Safety Transit Lines, supra,* cited by the Circuit Court of Appeals in the instant case to support its conclusion, involved in any way situations in which the

pleadings or issues were altered or amended. The case of *Park* v. *Mighell* did not involve a second trial at which evidence was to be taken but merely a re-reference of the case to the trial court to correct its findings based on the record as already made. The *Raleigh Bank & Trust Co.* case did involve a second hearing at which evidence was to be introduced, although it was made clear in the opinion that the issues on the second trial were identical with the issues on first trial, and that such second trial was in effect simply a continuation of the first trial.

All the cases would seem to emphasize the proposition that where there is any possible doubt, the doubt should be resolved in favor of granting a trial by jury.

This Court in the case of *Demick* v. *Schiedt,* 293 U. S. 474, 53 S. Ct. 296, 79 L. ed. 603, used this language:

> "Any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari to the United

States Circuit Court of Appeals for the Tenth Circuit and thereafter reviewing and reversing said decision.

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June, 1942.

⊙

No. 114

In the Supreme Court of the United States

October Term, 1941.

J. T. McCARTHY, JR., DOING BUSINESS AS HERCULES SUPPLY COMPANY, AND G. L. MEHOLIN,
Petitioners,
vs.
H. C. WYNNE AND AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA, *Respondents.*

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

Brief for Respondents in Opposition.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. 1279

J. T. McCARTHY, JR., DOING BUSINESS AS HERCULES SUPPLY COMPANY, AND G. L. MEHOLIN,
Petitioners,
vs.
H. C. WYNNE AND AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA, *Respondents.*

BRIEF *for* RESPONDENTS *in* OPPOSITION

Opinions Below.

The first opinion of the Circuit Court of Appeals is reported in 97 F. (2d) 964. The second opinion of the Circuit Court of Appeals is reported in 126 F. (2d) 620 and is found in the transcript of record (NR) at pages 179-184.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 26, 1942 (NR 184). A petition for rehearing was filed by the petitioners on March 28, 1942 (NR 235), and said petition was denied on April 14, 1942 (NR 236). A petition for a writ of *certiorari* was filed June 4, 1942. Juris-

diction of the court is invoked under Section 240 of the Judicial Code, as amended (Title 28, Sec. 347 (a), U. S. C. A.) and by Rule 38, Sec. 5 (b) of the Rules of this court, as amended.

Statement of the Case.

Petitioners' statement of the facts of this case is not regarded by respondents as being accurate and complete. It is thought that a clearer view of the facts may be presented by a complete statement rather than by endeavoring to correct and supplement the statement made by petitioners.

The Facts:

In July, 1924, respondent H. C. Wynne was appointed liquidating agent of the Colonial Supply Company, an Oklahoma corporation, hereinafter referred to as "Colonial," engaged in the business of selling oil well supplies. It operated stores at Henryetta and Wewoka, Oklahoma.

In December, 1924, negotiations were entered into between Wynne and McCarthy for the purchase by the latter of Colonial's stock of oil well supplies. A written contract was entered into, dated December 19, 1924, executed January 5, 1925 (OR 57), by the terms of which it was agreed that Colonial would ship to McCarthy the entire stock of oil well supplies of Colonial located at Henryetta and Wewoka, Oklahoma; that McCarthy should purchase 65% of the materials and pay therefor 75% of the factory prices; that the remaining 35% of the material should be held by McCarthy and be sold in the usual course of business, and Colonial should be paid 85% of the factory price of the goods as and when sold. The purchase price of the 65% of the goods was to be paid in installments—50% upon delivery, 25% in sixty days, and 25% in ninety days. It was agreed

that the goods to be purchased by McCarthy and the goods to be held on consignment should be designated and agreed upon at the time said materials were removed from the cars at Wortham, Texas. The contract contained other provisions not deemed material here. The contract was assigned by Colonial to Wynne (OR 60).

The supplies were loaded in freight cars and shipped to McCarthy at Wortham and Vernon, Texas, as requested by him, in December, 1924, and January, 1925 (OR 60). As the materials were being unloaded at Wortham, Wynne and McCarthy orally agreed that McCarthy might defer the election of goods to be purchased until a later date (OR 62, 117). Upon completion of the unloading and checking of the last car, Wynne wrote McCarthy on February 10, 1925, requesting an appointment to finish the matter (OR 118), but McCarthy requested delay (OR 118), and despite the insistence and repeated requests of Wynne (OR 126-130), he was unable to get an audience with McCarthy until May 15th of that year (OR 131); and it was September 29, 1925, before McCarthy furnished Wynne with any kind of statement of selection of the goods to be purchased (OR 64). Even then the statement was designated as temporary (Plaintiff's Exhibit 27, OR 146). In the meantime, McCarthy was selling the goods (Finding XIII, OR 64). On December 22, 1925, McCarthy sent Wynne a statement of consigned stock (Plaintiff's Exhibit 32, OR 150), and on January 7, 1926, McCarthy sent Wynne a statement of the goods which he elected to purchase (Plaintiff's Exhibit 36, OR 152). These two statements did not account for all of the goods received by McCarthy and were not accepted by Wynne (OR 64, 155).

The factory prices of the goods were not determined by

either party for some time after they were shipped. In the meantime, the question arose as to how much was due under the terms of the contract at delivery, and later, the sixty and ninety day payments. Estimates were resorted to, based upon an inventory dated August 4, 1924, but no agreement was ever reached (OR 131, 189). When Wynne completed pricing the goods, the total exceeded $39,000.00, whereupon McCarthy declined to purchase 65%, claiming that the contract obligated him to purchase only 65% of the estimated amount of goods in the stock which, according to McCarthy, was $24,206.77 (Finding XI, OR 64; Plaintiff's Exhibit 8, OR 121, 122). Several conferences were had and numerous letters and telegrams were exchanged both with respect to the price basis upon which the current payments should be made and upon McCarthy's contention that he should not purchase 65% of the total amount of goods delivered, but no agreement was ever reached (OR 189).

In the meantime, payments were made by McCarthy totaling $11,800.83 (OR 119). It is significant that the amount paid is the exact amount payable by McCarthy for the goods to be purchased based on his claim that he was only required to purchase 65% of the goods that were estimated to be in the stock regardless of the goods actually delivered. In addition to the payments made by McCarthy, he shipped to the order of Wynne goods of the factory price of $966.71 (OR 66). No other sum has ever been paid and no other goods have ever been returned to Wynne.

Suit Is Filed:

On the 16th day of March, 1933, this suit was instituted by H. C. Wynne, as plaintiff, against J. T. McCarthy, Jr., and G. L. Meholin, as defendants, in the District Court of

Oklahoma County, Oklahoma.* The cause was removed to the United States District Court by the defendants on the ground of diversity of citizenship, plaintiff being a citizen of Oklahoma and the defendants being citizens of Texas (OR 14-19). After the trial, but before judgment, the American Exchange Bank intervened, claiming an assignment from Wynne as collateral security, and judgment was rendered jointly in favor of Wynne and the bank (OR 108, 111). By this suit it was sought to subject certain property in Oklahoma County, Oklahoma, to the payment of the claim of Wynne against McCarthy. Some of the property stood in the name of Meholin, McCarthy's bookkeeper, and for that reason Meholin was made a party (OR 10). Service was had upon the defendants outside the State of Oklahoma (OR 12-13), and, of course, unless defendants entered their appearance, no personal judgment could be rendered.

Agreement Waiving Jury Trial:

Subsequently another suit was filed in the Superior Court of Okmulgee County, Oklahoma, by Wynne against McCarthy, and personal service of summons was had on McCarthy in that county. The case was removed to the United States District Court for the Eastern District of Oklahoma. A motion to remand each of the cases was filed by Wynne. Thereupon an agreement was entered into between Wynne and McCarthy (NR 8), wherein it was agreed

*A suit was filed by Wynne against McCarthy in the District Court of Tarrant County, Texas, in January, 1931. The cause was referred to a Special Master on the court's own motion, evidence was heard, and a report made by the Master to the Court, to which McCarthy excepted and demanded a jury trial (OR 164). Under the statutes of Texas this demand for jury trial rendered the trial before the Special Master nugatory. *San Jacinto Oil Co.* v. *Culberson*, 100 Tex. 462, 101 S. W. 197. It was thought by counsel for Wynne that the matter was of such a complicated nature that it could not be tried to a jury, where, as in Texas, trials are by special issues submitted to the jury, upon which all twelve jurors are required to agree.

that the case pending in the Eastern District of Oklahoma should be dismissed; that Wynne's motion to remand the case pending in the Western District of Oklahoma should be withdrawn; that McCarthy should enter his general appearance in the case pending in the Western District of Oklahoma; that both parties should waive a jury and that the case should be referred to a Special Master to hear the evidence, make findings of fact and conclusions of law in the manner authorized by the federal equity rules. The agreement covered other details not deemed important here.

The Issues:

Wynne's petition alleged that by reason of the fraudulent conduct of McCarthy therein detailed, McCarthy was estopped to claim that he had selected any portion of said merchandise for purchase, and that he should be deemed to hold the entire stock on consignment for sale for the use and benefit of Wynne, and that the amount paid by McCarthy should be considered as a credit on the consigned property; that McCarthy was not entitled to a discount, but should be required to account for the full factory price of all the property received (OR 7-8).

The petition alleged that there was delivered to McCarthy goods of the factory prices and value of $35,436.95 (OR 3); that payments totaling $11,800.83 had been made (OR 3), and that McCarthy was entitled to credit in the amount of $931.26 for goods delivered by McCarthy to the order of Wynne (OR 8). The petition prayed: for an attachment and garnishment against the property of McCarthy and that certain property standing in the name of Meholin, described in the petition (OR 10), be subjected to the payment of the claim against McCarthy; for discovery; and that McCar-

thy be required to account for all the merchandise received by him (OR 11).

By an amendment it was alleged that by the terms of the contract between Colonial and McCarthy, McCarthy was obligated to sell and/or to pay Colonial within a reasonable time 85% of the factory price of all goods held on consignment; that Wynne, being unable to secure a satisfactory accounting from McCarthy, on or about the 6th day of December, 1930, requested that he be allowed to recover possession of any unsold property; that McCarthy refused; that thereupon McCarthy became obligated and bound to pay Wynne 85% of the factory price of any goods remaining unsold, if he was not theretofore so obligated (OR 29).

McCarthy answered, alleging that he had overpaid Wynne for the goods received and claiming additional credit on account of transactions arising out of the contract in question and praying judgment against Wynne in the amount of $2,946.03 (OR 30-40). By an amendment and supplement McCarthy sought judgment against Wynne in the amount of $8,155.59 (OR 40, 44).

Judgment of the District Court:

The case was referred to a Special Master who heard the evidence, made findings of fact and conclusions of law (OR 52-69). The Master found that there was delivered to McCarthy goods of the factory price of $35,333.95. The Speecial Master concluded that under the terms of the contract McCarthy was obligated to pay for all of the merchandise received. However, the Master allowed McCarthy certain credits based upon certain agreements which he found Wynne and McCarthy made during their negotiations to settle. Except for reduction in the amount found by the

Master to be due Wynne, the District Court approved the report and rendered judgment (OR 111). Both parties appealed to the Circuit Court of Appeals for the Tenth Circuit.

Decision of Circuit Court of Appeals:

In an opinion filed May 31, 1938, the Tenth Circuit Court of Appeals sustained all of the findings of fact made by the Special Master, except with respect to certain credits allowed McCarthy, but held that, because of the failure of the parties to agree upon the selection of the goods to be purchased and those to be held on consignment, the provisions of the contract with respect to paying certain percentages of the factory prices never became operative. The court further held, however, that by placing these goods in his stores, commingling them with other like goods, and offering them for sale in the usual course of trade, as the Master found he did, McCarthy converted the goods and was liable for the market value thereof upon an implied promise arising out of his conversion. 97 F. (2d) 964, 970.

The court directed that the judgment be vacated and that the cause be remanded "with instructions to permit Wynne to amend his petition and to proceed further in accordance with this opinion." (NR 13).

Proceedings Subsequent to Remand:

Thereafter Wynne filed an amendment to his petition paraphrasing the language of the Circuit Court of Appeals and alleging that the market value of the property delivered to McCarthy was $38,580.00; that McCarthy was entitled to credits "heretofore adjudged in his favor in the total sum of $12,814.10 and no more," and prayed judgment for $26,165.90 with interest and costs (NR 15).

Thereupon McCarthy filed an answer and counterclaim, not only to this amendment but to the plaintiff's petition as a whole, raising all of the issues that had been previously raised and decided by the Circuit Court of Appeals, and praying judgment against Wynne in the amount of $3,184.97 with interest (NR 16-22). At the same time, McCarthy filed a demand for a jury trial (NR 23).

Upon motions filed by Wynne, an order was made striking the answer filed by McCarthy, denying the demand for jury trial, and limiting the issues to be tried to the value of the property at the time of the conversion (NR 25).

McCarthy thereupon filed an answer to the amendment to the petition (NR 27).

Thereafter the case was tried before the District Court and judgment was rendered in favor of Wynne and against McCarthy for $13,150.95 with interest and costs (NR 28-30).

Second Decision of the Circuit Court of Appeals:

From this judgment McCarthy appealed to the Tenth Circuit Court of Appeals, where the judgment was affirmed, that court holding that the District Court had correctly interpreted its mandate in restricting the issues to the value of the property at the time of the conversion and that the trial court had properly denied McCarthy's demand for a jury trial (NR 179-184).

ARGUMENT.

Petitioners' asserted grounds for *certiorari* are *(1)* that the mandate of the Circuit Court of Appeals did not direct or authorize the restriction of the issues but that a new trial in all respects was required; *(2)* that, in any event, petitioners were entitled to a jury trial of the issues that were tried.

Our answer to these contentions follows. A summary of the argument will be found in the index.

POINT I.

The Circuit Court of Appeals, by its mandate, directed that the issues be restricted.

(a) ***The Circuit Court of Appeals has so said, and it is the highest authority with respect to the interpretation of its own mandate.***

Two district judges, upon due consideration of the mandate, reached the conclusion that the Circuit Court of Appeals did not direct that a new trial of all issues be had, but that only the question of the market value of the goods be determined (NR 25-26). The Circuit Court of Appeals affirmed (NR 184). The *power* of the Circuit Court of Appeals to direct that the issues be so restricted is undoubted, whether the action be regarded as one at law or in equity. (See authorities cited, *infra*, pp. 13-14.) Therefore, the question is merely one of *intention* of the appellate court. Inasmuch as that court has said that its intention was to restrict the issues, it is difficult to see what question remains for this court to decide or how any question of public importance can be involved.

(b) ***The case was originally tried, appealed, and decided by the Circuit Court of Appeals as an equity case. The mandate must therefore be interpreted as a mandate in an equity case.***

It is conceded by petitioners that this case as originally filed and tried was in equity. A formal agreement to that effect mas made (NR 8-10). The case was tried and appealed as an equity case, and the Circuit Court of Appeals filed its opinion and mandate without any suggestion that the case was not properly in equity (NR 11-14, 183; 97 F. (2d) 964).

In this situation the Circuit Court of Appeals was powerless to consider the appeal on its merits other than as an equity case, whether or not it was such in fact. *Twist* v. *Prairie Oil & Gas Co.*, 274 U. S. 684.

And the parties are estopped to question the equity jurisdiction. *Lyons Milling Co.* v. *Goffe & Carkener,* (C. C. A. 10) 46 F. (2d) 241.

The mandate was therefore issued and filed in an equity case and must be interpreted as mandates in equity cases are interpreted.

(c) ***In equity cases, new trials are not granted, the practice being to remand for further proceedings.***

On the first appeal the Circuit Court of Appeals, after summerizing the pleadings, the findings of the Master, and the judgment of the court, said:

> "To review the evidence would unduly extend this opinion. Suffice it to say, that the findings of fact made by the Special Master, except as to certain deductions credited to McCarthy, are fully supported thereby."

The deductions credited to McCarthy were the basis of respondents' appeal in Case No. 1638 in the Circuit Court of Appeals.

The judgment was vacated solely because under the facts found by the Special Master and approved by the trial court and by the Circuit Court of Appeals an erroneous measure of recovery was applied—and by the order remanding, the Circuit Court directed that Wynne be allowed to amend his petition to set up the market value of the property and that recovery be based on that value instead of a specified percentage of the factory prices as provided by the contract. The Circuit Court did not direct that a new trial be granted, but it directed that Wynne be permitted to "amend his petition and to proceed further in accordance with the opinion of this court" (NR 13).

To "proceed further in accordance with the opinion of this court" required that all findings of fact made by the Special Master (except certain deductions made in McCarthy's favor) be preserved, and that an additional fact be determined; namely, the market value of the property at the time of the conversion, and that judgment be rendered on such finding.

Not only has the Circuit Court of Appeals, on the second appeal, said that it intended by the language used in its mandate to direct that the issues be limited to a determination of the market value of the property, but the language of the court in its opinion and mandate is susceptible of no other construction, interpreted in the light of mandates in equity cases.

The rule against granting a new trial in equity cases is so firmly planted that even when the appellate court directs that a "new trial" be granted the mandate will be con-

strued to mean only that further proceedings be had in conformity with equity practice. This court so held in *The Board of Supervisors of Wayne County* v. *Kennicott,* 94 U. S. 498, and said, *inter alia:*

> "Technically, there can be no 'new trial' in a suit in equity; * * * ."

The whole subject of the interpretation of mandates in equity cases is covered by this court in *Gaines* v. *Caldwell,* 148 U. S. 228, and *Latta* v. *Granger,* 167 U. S. 81. Those cases construed a mandate issued in *Goode* v. *Gaines,* 145 U. S. 141, which was a suit to impress a constructive trust upon land and to require an accounting. This court approved the judgment in respect of the land but expressed dissatisfaction with the accounting and entered this order:

> "The decrees are severally reversed and the causes remanded to the Circuit Court, with a direction for further proceedings in conformity with this opinion, the costs of this court to be equally divided."

This court, in *Gaines* v. *Caldwell, supra,* held that this mandate was intended only to require further proceedings with respect to the matters about which the court had expressed its dissatisfaction, and that as to all other matters the judgment should be affirmed. The court said:

> "The mandate and the opinion, taken together, although they used the word 'reversed,' amount to a reversal only in respect of the accounting, and to a modification of the decree in respect of the accounting, and to an affirmance of it in all other respects. * * *
>
> "It is, we think, very plain that so much of the decree of the Circuit Court of November 11, 1887, as was not disapproved by this court still stands in full force."

This court granted a writ of mandamus in the above case, thus permitting a retrial of the question of accounting only.

The mandate in *Goode* v. *Gaines, supra,* was further limited by this court on a second appeal in *Latta* v. *Granger, supra,* where the court said that even with respect to the accounting the trial court was limited to that feature of the accounting about which the court expressed its dissatisfaction in its opinion, and that the whole subject of the accounting was not to be reopened. This court said:

> "The reversal of that decree amounted to nothing more than a vacating of the accounting so as to permit of a modification thereof in particulars pointed out with sufficient precision in the opinion, and it might well be held that the Circuit Court had no power, under our mandate, to again go into the questions of rental rate and value of improvements, for they have been determined, * * * ."

To the same effect see *H. P. Coffee Co.* v. *Reid, Murdock & Co.,* (C. C. A. 8) 60 F. (2d) 387, 388; *Ellis* v. *Reed,* (C. C. A. 9) 238 Fed. 341; *Mortgage Loan Co.* v. *Livingston,* (C. C. A. 8) 66 F. (2d) 636; *Harrison* v. *Clarke,* (C. C. A. 8) 182 Fed. 765.

PETITIONERS' AUTHORITIES DISTINGUISHED.

All of the authorities cited by petitioners under their Point E (petitioners' brief, pages 29-31) dealt with mandates issued by appellate courts in appeals of *law* actions.* Not one of them was in equity. Petitioners fail to take any

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*The quotation from 5 C. J. S. at page 1476 is inaccurate and incomplete in that the quotation shows the sentence to end with the quotation, whereas the sentence continues "except as restricted by the opinion of the appellate court." The importance of this omitted clause is shown by the decisions cited herein under Point I (c), *ante,* pages 11-14, and by *Gulf Refining Co.* v. *United States,* 269 U. S. 125.

cognizance whatever of the conceded fact that the mandate of the Circuit Court of Appeals was issued in an equity action, whatever the case may properly have been after the amendment pursuant to that mandate.

Moreover, the modern tendency even in law actions is to restrict the issues to be retried to the issues that were not properly determined. *May Department Stores Co.* v. *Bell*, (C. C. A. 8) 61 F. (2d) 830, 842, 843; *Mutual Life Insurance Co. of New York* v. *Sayre*, (C. C. A. 3) 81 F. (2d) 752; *Empire Fuel Co.* v. *Lyons*, (C. C. A. 6) 257 Fed. 890, 897, 898; *U. S. Potash Co.* v. *McNutt*, (C. C. A. 10) 70 F. (2d) 126.

Even though we consider the mandate as in a law action, the action of the Circuit Court of Appeals in restricting the issues to the value of the property was clearly justified. Unlike the situation involved in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, the issues of liability and amount of liability were clearly severable and distinct. There was no question but that McCarthy received a large amount of goods for which he had not paid. The Special Master, the trial court, and the Circuit Court of Appeals all agreed that he received the identical goods which were listed and described in a certain inventory made jointly by McCarthy and Wynne at the time the goods were unloaded from the freight cars (OR 62, Finding VIII). There was therefore no occasion to again retry the question of what goods were received. There was only one other question: What was the value of the goods?

The petitioners complain that they were not allowed to litigate the question of the date of the conversion, they saying that that question was material on the matter of interest. They also complain that there was no evidence of the date

of conversion on the second trial (petitioners' brief, pages 27-28). That question was determined by the Circuit Court of Appeals when it held that McCarthy converted the goods at the time he placed them in his stores and offered them for sale without selecting the goods to be purchased from those to be held on consignment. The finding of the Special Master, approved by the trial court and by the Circuit Court of Appeals, was that two carloads were shipped to McCarthy at Wortham, Texas, in the early part of January, 1925, and one carload was shipped to McCarthy at Vernon, Texas, on February 6, 1925 (OR 60). Another finding sustained by the trial court and by the Circuit Court of Appeals was that the "materials and supplies as received were immediately placed on sale in the stores of the defendant J. T. McCarthy, Jr. * * * " (OR 64).

The undisputed evidence is that after the last car was unloaded and on February 10, 1925, Wynne wrote McCarthy, requesting an appointment to finish the matter (OR 118), but that an audience with McCarthy was not obtained until May 15th of that year (OR 131). The trial court found that the goods were converted on or about February 15, 1925 (NR 28). That date was several days later than the uncontradicted testimony shows that the goods were placed in the stores and offered for sale, and, under the holding of the Circuit Court of Appeals, were converted.

The case of *Warner* v. *Godfrey*, 186 U. S. 365, cited by petitioners (Bf., p. 31) is not in point. McCarthy *was* allowed to defend against the new issue raised by the amendment. He did contest the market value of the property. The facts constituting his liability on the theory of conversion were found by the trial court and affirmed by the Circuit Court of Appeals. McCarthy did contest in the Circuit Court

of Appeals his liability on the theory of conversion on the facts thus found.

Point II.

The amendment pursuant to the mandate did not convert the case into an action at law. There was therefore no right to a jury trial.

(a) *The character of the action was not changed by the amendment. If the action was at law after the amendment, it was at law originally. Petitioners are therefore estopped by their agreement and by their conduct to assert that the action was at law.*

The case having been considered by the parties and the courts as an equity action, at least until the last amendment was filed, it is incumbent upon petitioners to show, not only that the action was one at law after the amendment, *but that it was not an action at law before.* In other words, if the action was not properly in equity before the amendment, petitioners waived any objection to equity jurisdiction, and they will not be permitted to avoid that waiver merely because an amendment has been filed *making a slightly different law action than it was before! Lyons Milling Co.* v. *Goffe & Carkener,* (C. C. A. 10) 46 F. (2d) 241.

A comparison of the issues before and after the amendment will reveal the frivolous nature of petitioners' contention. The many grounds of equity jurisdiction existing before and after the amendment are set forth under Point II (b), *post.* The only difference in the issues before and after was this: Before the amendment, respondents sought recovery of *specified percentages* of the *factory prices* of thousands of items of oil well supplies delivered to McCarthy under the terms of an express contract (OR 1-11, 26-29, 320-413). After the amendment, recovery was sought for

the *market value* of the same goods delivered under the same contract. Every other issue was identical.

The amendment was drawn on the theory that all issues other than the value of the property had been settled. It was couched in the language of the Circuit Court of Appeals. Credits were allowed McCarthy in the exact amount stated in the findings. Standing alone, the amendment presents a very simple issue. But if it stands alone, it is because the other issues were adjudicated, and, in that event, this is but a continuation of the same case and not a new trial. If the other issues have not been adjudicated, then the whole case, including the amendment, must be looked to in determining the nature of the case. So viewed, it is not apparent, and counsel for petitioners do not explain, how an adequate remedy at law existed after the amendment that did not exist before.

Counsel *assume* that because the Circuit Court of Appeals held that the express contract did not govern, the equity jurisdiction of the court failed. Counsel *assume* that the decision of that court that the property was converted precludes equitable relief. There is no basis for such assumptions.

It should be observed that paragraph 10 of the original petition on file at the time agreement waiving a jury was made (OR 8) alleged facts showing that McCarthy, on December 9, 1930, converted all of the goods remaining on hand at that time unsold and thereby became liable and bound to account to Wynne for the factory price thereof, as well as for that part of same which he had theretofore sold, if he was not bound by the contract to pay therefor. Thus, if a mere charge of conversion, irrespective of what else may be involved in the case, renders the action one at law,

the action was one at law at the time the agreement waiving a jury was made, and therefore the issues were not changed from an equitable action to a law action by the amendment.

No Distinction Between Express and Implied Agreements.

The Circuit Court said that Wynne might waive the tort and sue on McCarthy's implied promise to pay for the converted goods. The right to waive the tort and sue the tort-feasor in assumpsit or on account is established by numerous authorities. Note, 97 A. L. R. 251; *Guerini Stone Co.* v. *P. J. Carlin Constr. Co.*, 248 U. S. 334, 63 L. ed. 275, 284. And when suit is brought on the implied promise the case is governed by the same principles applicable to a suit on an express contract. Thus the claim may be pleaded as a counterclaim under a statute permitting a counterclaim only on a claim arising on contract. *Felder* v. *Reeth*, (C. C. A. 9) 34 F. (2d) 744, 97 A. L. R. 244; *Farmers' & Merchants' Natl. Bank* v. *Huckaby*, 89 Okl. 214, 215 Pac. 429. And see 1 C. J. S. 582.

Counsel for petitioners make much of the fact that the original suit was predicated on the written contract, whereas the liability of McCarthy was adjudged to be on an implied contract for the value of the property. In this, counsel merely *assume* that a suit upon an express contract is properly brought in equity, whereas a suit on an implied contract, arising out of conversion, must be in a court of law. Counsel cite no authorities to sustain this contention, and we know of none.

It should be observed also that Wynne's original petition did not seek to recover the contract price, but sought to recover the factory prices without the discounts provided by the contract (OR 7, paragraph 9). Thus, at no stage of

this case did Wynne seek to recover under the terms of the express contract—if that matters.

(b) *The issues, after the amendment, were cognizable in equity.*

The allegations made in the pleadings upon which the former trial was had are identical with the pleadings as amended, except that recovery by the amendment was based on the market value of each item instead of the factory prices. The items sued upon were identical; the facts giving rise to the action were the same; the only change was in one theory of law—the measure of the recovery.

There are five grounds for sustaining the equity jurisdiction after the amendment, without regard to the points hereinabove discussed. These reasons will now be enumerated:

(1) There existed between Wynne and McCarthy a fiduciary and a trust relation. McCarthy was trusted with Wynne's property with the privilege and duty of selecting the goods that he would purchase and those he would hold and sell on consignment. A fiduciary relation "arises wherever a trust, continuous or temporary, is specially reposed in the skill or *integrity* of another, *or* the *property* or pecuniary interest, in the whole or in a part, or the bodily custody of one person is placed in the charge of another." 25 C. J. 1119; *McKinley* v. *Lynch*, 58 W. Va. 44, 51 S. E. 4, 9 (Quoting 1 Bigelow on Frauds, p. 262); *Hivick* v. *Urschel*, 171 Okl. 17, 40 P. (2d) 1077-1080—holding that the assignee of an oil and gas lease, who was obligated to pay a bonus out of oil, occupied a fiduciary relation to the holder of the bonus. The relation of principal and factor is of a fiduciary character. 25 C. J. 342. *A fortiori* the placing of goods in possession of a person, who, under a contract, is to become

a factor upon his selecting the goods to be held on consignment, creates a fiduciary relation between the parties. The effect of this relation upon the nature of the suit as being one in equity will be seen from the authorities hereinafter referred to.

(2) Fraud was charged against McCarthy (OR 7). This alone is adequate ground for the interposition of equity.

In 19 Am. Jur., p. 63, the rule is stated as follows:

> "It frequently is said in a general way that ground for equitable relief exists in, or that chancery courts have jurisdiction over cases arising out of, fraud, misrepresentation, concealment, fraudulent suppression of facts, bad faith, or breach of trust. Indeed, the statement is recurrent that there is no other ground on which jurisdiction in equity is so readily entertained and freely exercised. The jurisdiction of equity over such cases is said not to be dependent on discovery."

(3) The petition was in the nature of a creditor's bill before judgment. It sought to reach property held by Meholin in trust for McCarthy (OR 10), a nonresident. This alone gave jurisdiction in equity. *Gaskins* v. *Bonfils,* (C. C. A. 10) 79 F. (2d) 352; *Williams* v. *Adler-Goldman Commission Co.,* (C. C. A. 8) 227 Fed. 374; *Johnston* v. *Byars State Bank,* 141 Okl. 277, 284 Pac. 862; *White Co.* v. *Finance Corp. of America,* (C. C. A. 3) 63 F. (2d) 168.

By stipulation and order of the court, certain funds due McCarthy and Meholin were impounded in lieu of the property attached and the funds reached by garnishment (OR 102, 104-106). Title to these funds was clouded because of Meholin's holding the legal title to the properties from which said funds were derived (OR 10, 105). The final judgment in this case directed that said funds be applied to the

payment of the judgment against McCarthy (NR 29). Thus, the creditor's bill feature of the petition was sustained. Meholin's interest in these funds was extinguished (NR 29). That was purely an equitable remedy. The mere substitution of the money for the property did not change the character of the suit. The question is whether at the time the suit was filed a case in equity existed. *Doak* v. *Hamilton*, (C. C. A. 4) 15 F. (2d) 774, 778.

(4) Mutual accounts were involved. Wynne sought to recover for the goods shipped. McCarthy sought to recover for goods returned to Wynne, and for commissions thereon (OR 39, 45). McCarthy sought to recover freight charges in moving property (OR 39, 43) and for taxes on the property (OR 39, 43) and for overpayment on goods purchased (OR 44).

The fact that mutual accounts were involved alone is ground for equity jurisdiction.

In *Kilbourn* v. *Sunderland*, 130 U. S. 505, 32 L. ed. 1005, the defendants had defrauded the plaintiffs while acting as their agents in purchasing and handling real estate. *Their misdeeds were torts* (53 A. L. R. 818) but the court held that equity had jurisdiction of an accounting suit where the remedy at law was embarrassed by fraud involving a fiduciary and trust relationship. We quote:

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. The parties stood in a fiduciary relation towards each other, and in the course of the transactions between them, from thirty to forty different lots of ground were bought for the complainants in upwards of fifteen distinct purchases. As to five of these purchases fraud is specifically

charged. A considerable amount of complainants' money was in defendants' hands, and a counterclaim was set up by them in relation to services performed in and about the care of a portion of the property purchased; services covering many payments for taxes, interest, etc.; making of loans and procuring renewals; receipts and advances. The transactions were all parts of one general enterprise, and the claims of a character involving trust relations. Before the severance of the connection between the parties, Kilbourn & Latta dissolved, and the amounts due from Kilbourn & Latta, if any, and from Latta alone, if any, to Sunderland and Hillyer or to Sunderland, and the offsets and counterclaims of Kilbourn & Latta, or of Latta, all sprang from one series of operations, and required an accounting on both sides; and that accounting, until disentangled by the investigation of the court, was apparently complicated and difficult. 'There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law' (1 Story, Eq. Jur., Sec. 450); and, as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the Supreme Court of the district in sustaining the jurisdiction."

The situation described in that case is strikingly similar to the one here involved—the fiduciary relation of the parties; the trust relation; a counterclaim was set up by petitioners in relation to services performed, taxes paid, freight paid, goods returned, over payment for goods received; "the transactions were all parts of one general enterprise"; "all

sprang from one series of operations and required an accounting on both sides."

(5) Aside from all other consideration, the account was long and complicated, and that fact alone sustains the equity jurisdiction. *Kirby* v. *Lake Shore & M. S. Railroad,* 120 U. S. 130. The pleadings disclosed (and the evidence emphasized) that the receipt, condition, and value of practically every one of the thousands of items involved in this case was disputed. The question of jurisdiction in equity of a case of this kind was carefully considered and the authorities exhaustively reviewed by the late Judge McDermott in *Goffe & Carkener* v. *Lyons Milling Co.,* (D. C. Kan.) 26 F. (2d) 801; affirmed on other grounds, (C. C. A. 10) 46 F. (2d) 241. We respectfully refer the court to that opinion for a review of the authorities on this question.

See also Pomeroy's Eq. Jur. (5th Ed.), Vol. 4, Section 1421; 7 Cyc. Fed. Proc., p. 2; *Fechteler* v. *Palm Bros. & Co.,* (C. C. A. 6) 133 Fed. 462; *McMullen Lumber Co.* v. *Strother,* (C. C. A. 8) 136 Fed. 295; *Hapgood* v. *Berry,* (C. C. A. 8) 157 Fed. 807; *Hattiesburg Lumber Co.* v. *Herrick,* (C. C. A. 5) 212 Fed. 834.

Point III.

The agreement between the parties waiving a trial by jury was binding to the end of the litigation. For that reason, also, the demand for a jury trial was properly denied.

We concede the general rule to be that an ordinary stipulation waiving a jury in a *law* action does not extend to a second trial after reversal and remand for a *new trial* by an appellate court (Petitioners' Bf., p. 32).

Here, however, no new trial was granted. The direction of the Circuit Court of Appeals was to take further evidence

and render judgment in accordance with the opinion of that court. No case has been cited to sustain the contention that under these circumstances petitioners were entitled to withdraw from the agreement waiving a trial by jury. There are cases, however, holding that under these circumstances a party may not withdraw from such an agreement. *Park* v. *Mighell*, 7 Wash. 304, 35 Pac. 63; *Raleigh Banking & Trust Co.* v. *Safety Transit Lines, Inc.*, 200 N. C. 415, 157 S. E. 62.

Moreover, even though it should be regarded that a new trial was granted in this case (contrary to the holding of the Circuit Court of Appeals), and that this was a law action, the agreement in this case waiving a trial by jury is distinguishable from an ordinary stipulation of parties waiving a trial by jury, and petitioners would not have been entitled to withdraw from their agreement to waive a jury.

In consideration of McCarthy's agreement to enter his general appearance in this case, waive a jury, and expedite the trial, Wynne agreed to dismiss a similar suit pending in the Eastern District of Oklahoma and withdraw his motion to remand this case to the state court, all of which he did. In the light of the history of this litigation as related in the statement of facts herein, it is manifest that the parties intended that the case should be finally concluded without the intervention of a jury. The difficulty of trial by jury, as demanded by McCarthy in the Texas case after the issues had been settled by a report of a Special Master, was the motivating cause for instituting this action in Oklahoma. Obviously, therefore, the parties intended by the stipulation to forever preclude the intervention of a jury in the trial of this action. This case is therefore distinguishable from the line of cases supporting the general rule that a stipulation waiving a jury is not binding on a second trial. The leading case supporting the general rule is *Burnham* v. *North Chica-*

go St. Ry. Co., (C. C. A. 7) 88 Fed. 627 (Petitioners' Bf., p. 33). The other cases either cite or follow a later one which cited this case as authority for the rule announced.

In the last paragraph of that opinion the court said:

> "Nor is this court ready to concede that the waiver of the right of jury trial is absolutely binding upon the party, even as to the one trial where it is intended to be applied. *A stipulation to waive, followed by an order of the court, is not in the nature of a private contract founded upon a consideration, which can only be set aside for fraud.* It is a proceeding in court, which is liable to be changed or modified or set aside by order of the court, in its discretion, upon a proper showing." (Emphasis supplied.)

This agreement to waive a jury is the very thing that the court said the stipulation there involved was *not!* This agreement *was* "in the nature of a private contract founded upon a consideration which can only be set aside for fraud." Under axiomatic principles, the reason for the general rule being inapplicable to the facts of this case, the rule itself does not apply.

We think counsel for petitioners are mistaken (Petitioners' Bf., p. 33) in saying that in the case of *Burnham v. North Chicago St. Ry. Co., supra*, the stipulation involved mutual agreements other than the waiver of jury trial. See the stipulation, 88 Fed. at page 627. It certainly is not that character of stipulation that is involved in this case. It is not the fact that the agreement waiving a jury trial was in writing that distinguishes it from the cases cited by petitioners. The distinguishing feature is the fact that the agreement was a private contract based on considerations other than the mutual agreement of the parties to waive a jury.

We also think counsel for petitioners are in error (Petitioners' Bf., p. 32) in saying that the Tenth Circuit Court

of Appeals cited *Park* v. *Mighell,* 7 Wash. 304, 35 Pac. 63, and *Raleigh Bank & Tr. Co.* v. *Safety Transit, Inc.,* 200 N. C. 415, 157 S. E. 62, in support of its conclusion that because the stipulation waiving a jury on the first trial contained other mutual stipulations constituting a consideration therefor McCarthy was not entitled to a jury trial. As we interpret the opinion, those cases were cited in support of the conclusion that McCarthy was not entitled to a jury trial because *further proceedings* had been directed, not a new trial. The authorities cited sustain that conclusion, and they are not in conflict with any of the authorities cited by petitioners (Petitioners' Bf., p. 32).

The Circuit Court of Appeals' statement that the agreement waiving a jury was not an ordinary waiver of trial by jury, but was in the nature of a private contract, is a distinction justified by the leading case of *Burnham* v. *North Chicago St. Ry. Co., supra,* which case was cited in our brief in the Circuit Court of Appeals.

It is submitted that the petition should be denied:

(1) Because the decision of the Circuit Court of Appeals is in accord with settled law and is not in conflict with the decision of any other Circuit Court of Appeals; and

(2) Because no question of general importance is involved.

Respectfully submitted,

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NO. 114

In the Supreme Court of the United States

J. T. McCarthy, Jr., Doing Business as Hercules Supply Company, and G. L. Meholin,
Petitioners,

VERSUS

H. C. Wynne, and American Exchange Bank of Henryetta, Oklahoma,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF PETITIONERS

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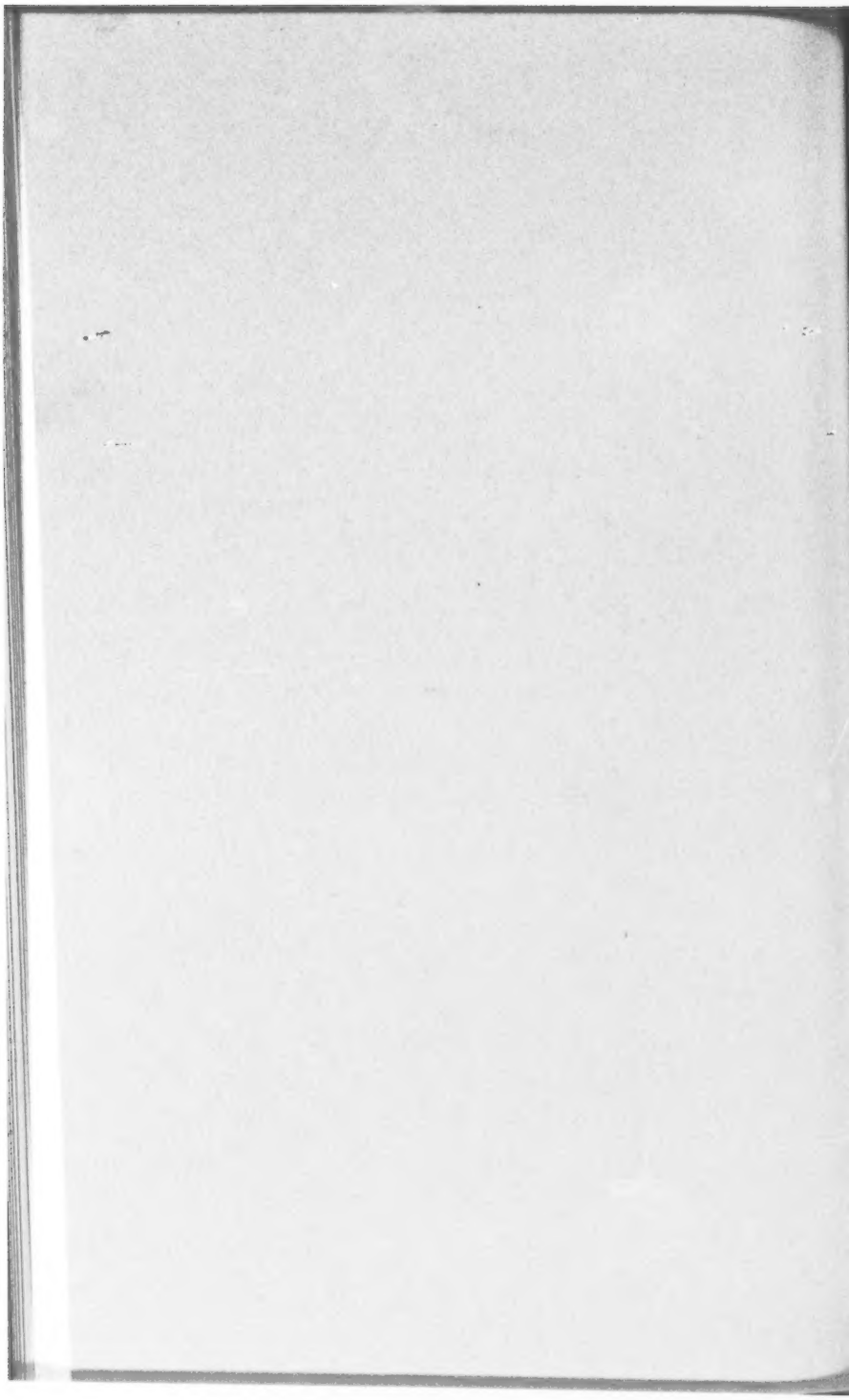

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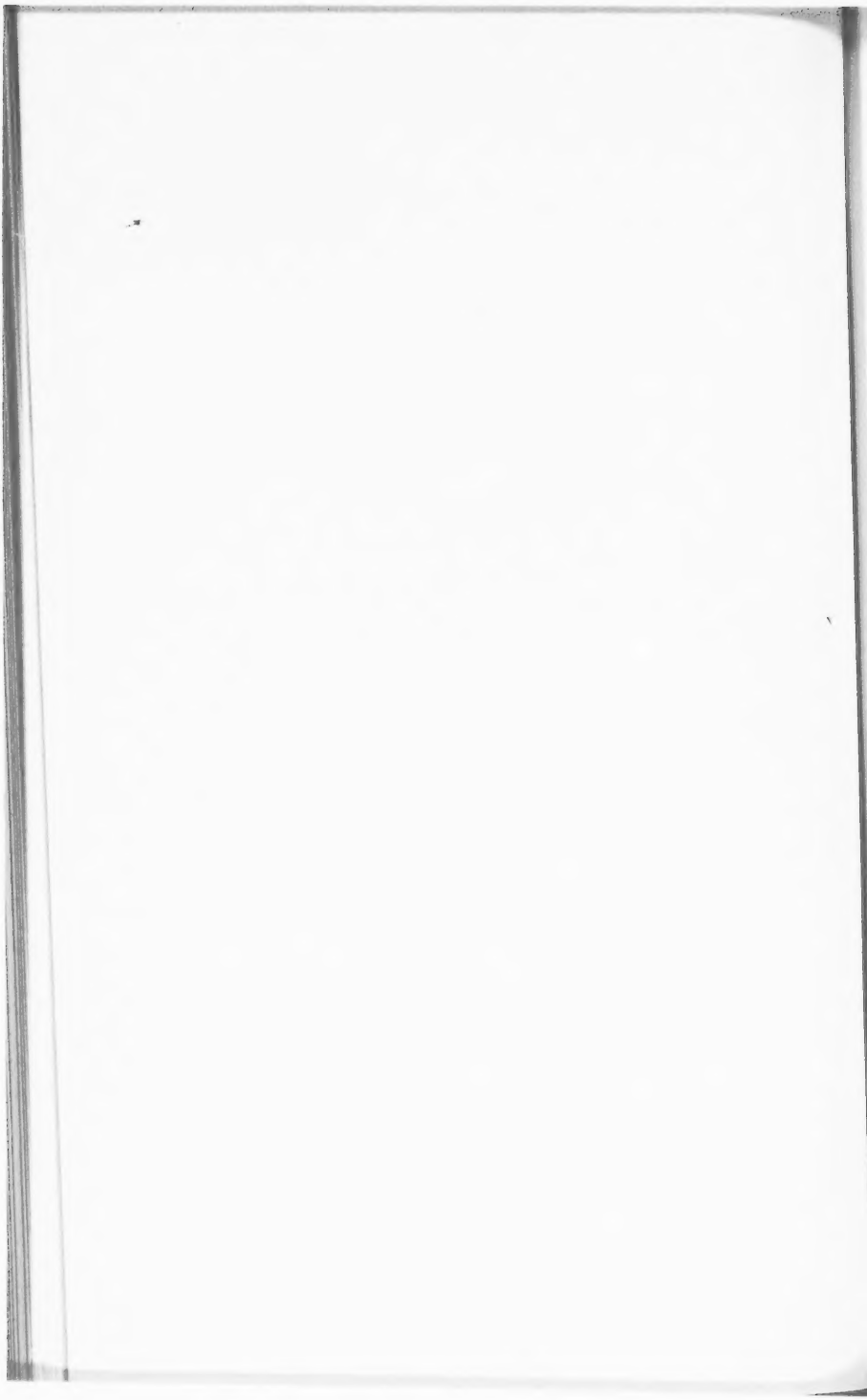

NO. 114

In the Supreme Court of the United States

OCTOBER TERM, 1942

J. T. McCARTHY, JR., Doing Business as Hercules Supply Company, and G. L. MEHOLIN,
Petitioners,

VERSUS

H. C. WYNNE, and AMERICAN EXCHANGE BANK OF HENRYETTA, OKLAHOMA,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit.

REPLY BRIEF OF PETITIONERS

Pursuant to authority of Subsection (a), Section 4, Rule 38, of the Revised Rules of this Court, petitioners in aid of the Court desire to briefly reply to the brief of respondents in opposition to petition for certiorari.

First. Reply to Respondents' Point I.

The whole of respondents' Point I is predicated on the premise that inasmuch as the action originated as a suit in equity, the mandate on first appeal, the interpretation thereof, and the rights of the parties following the first appeal are governed by rules applicable to mandates and further procedure in equity cases. They wholly disregard the

fact that when the Circuit Court of Appeals on first appeal determined that Wynne was not entitled to the equitable relief originally sought based on the written contract, but that instead his remedy was for money judgment in conversion or on implied contract arising out of conversion (for which Wynne had an adequate remedy at law), and granted him leave to amend his petition, equity lost jurisdiction and the further proceedings and rights of the parties would be those applicable to an action at law.

Cases holding that under the circumstances last named equity loses jurisdiction, and that the further proceedings and rights of the parties are those applicable to actions at law and not suits in equity are cited in petitioners' brief in support of petition for certiorari under Point B, Proposition I.

Cases holding that the remedy of conversion or on implied contract growing out of conversion is one at law and not in equity are cited in petitioners' brief in support of petition for certiorari under Point A of Proposition I.

Respondents rely upon the decision of this Court in the case of *Twist* v. *Prairie Oil & Gas Co.*, 27 U. S. 684, 71 L. ed. 1297, as holding that once having been tried in equity and appealed as an equity case, the Court was powerless to thereafter treat the case as anything but a suit in equity.

Such was not the holding in the Twist case. There this Court merely held that in a suit brought, tried, and appealed as an equity case, the Circuit Court of Appeals must either review it as an equity case, if properly in equity, or if not properly in equity, then to dismiss or remand it with

the right in plaintiff to retry it as a law action; that the Appellate Court could not treat such an action as having been tried at law, when in fact it had not been, and thus proceed to decide the case on its merits. The opinion in that case is strongly in support of petitioners' contention herein that when the Court on first appeal determined that Wynne was not entitled to the relief first sought but that his remedy was one cognizable at law, when the case should have been, and in fact was, remanded to the court below to be there recommenced and proceeded with as an action at law entitling McCarthy to a new trial.

Respondents further contend that, inasmuch as petitioners in the first instance stipulated that the case prior to first appeal was properly on the equity docket and without objection tried the case as an equity case, they were estopped following the decision on first appeal to claim that the suit was no longer in equity. In support of this contention respondents cited *Lyons Milling Co.* v. *Goffe & Carkener* (10th C. C. A.), 46 Fed. (2d) 241.

Respondents overlook the fact that prior to first appeal the case was properly a suit in equity. Wynne attempted to state a cause of action cognizable by a court of equity. He sought equitable relief. This, under the rule stated in *Twist* v. *Prairie Oil & Gas Co., supra,* characterizes the suit as one in equity, notwithstanding the fact that it was later determined from the evidence that Wynne was not entitled to the relief sought. It was not until the Circuit Court of Appeals on first appeal (based on the evidence and not the pleadings) denied the relief thus sought and held that Wynne's remedy should be that of conversion or on implied

contract arising out of conversion, cognizable at law, that equity lost jurisdiction and the character of the action changed from that of a suit in equity to an action at law. Immediately, then, upon the amendment to Wynne's petition to state a cause of action at law rather than in equity, McCarthy filed his demand for a jury trial as in law actions. At that time the new Federal Rules of Civil Procedure were in effect and a motion to transfer the case to the law side of the court would have been out of order. How, under these circumstances, can it be said that McCarthy's recognition of the suit as one in equity, at a time when, because of the nature of the relief asked, it was properly a suit in equity, estop him from claiming rights guaranteed him in a law action after the nature of the case has been changed to that of a law action? In the *Lyons Milling Company* case, *supra,* as well as in the cases therein cited, the issues and the nature of the action remained the same throughout the litigation and there was no question regarding any change in the nature of the action between the time the question of equity jurisdiction was raised and the time the court held it should have been raised.

Based then on the false premise that because the action originated in equity, or that McCarthy was estopped to question the equity jurisdiction, respondents under Subsection (c) of their Point I discuss and cite authorities applicable to equity mandates.

Petitioners have no quarrel with the general rules thus announced with respect to equity mandates, except that they have no application here. Equity lost jurisdiction

The action thereafter was one at law. Rules, procedure, and rights applicable to law actions then prevailed.

Even, however, in the case of an equity mandate, where the pleadings are amended and a new theory of liability is presented, as in this case, the parties should be entitled as a matter of equity to a new trial, at least as to such new theory of liability. Respondents cite no cases in which there was a change in the issues and the theory of recovery before and after the appeal.

The claim is made (Resp. Br. pp. 15-16) that since there can be no question but that McCarthy received the goods, the only possible remaining question to be retried would be that of the value of the goods. His pleadings admit this fact. But a suit asking that he in equity account for such goods under the provisions of a written contract upon which both parties are relying, being the theory of recovery prior to first appeal, and an action predicated on conversion of the goods at a particular time and place, being the theory of recovery after first appeal, constitute two separate and distinct lawsuits. In the one the defendant would not be called upon or have the opportunity of presenting defenses that he might have to the other. McCarthy has never had a trial in which he was called upon or permitted to try the issue of conversion, and yet he now finds himself subject to a judgment for conversion. He was most certainly entitled to a trial of the issue of conversion.

The only allegation of plaintiff's petition prior to first appeal that might in any way suggest the idea of conversion was the allegation contained in paragraph 10 (N. R. 230),

wherein it was alleged that plaintiff being unable to secure a satisfactory accounting from the defendant, "on or about the 6th day of December, 1930, requested that he be allowed to recover possession of any unsold property," and that at that time McCarthy through his attorney refused such request except upon certain conditions he had no right to make. Even based on this allegation Wynne did not ask for judgment as for conversion, but simply claimed that McCarthy thereby became obligated to account for the unsold goods under the 85% provision of the contract rather than on the split 75% and 85% provisions. Assuming, however, that the allegation last above referred to was in fact an allegation of conversion, such allegation of a refusal to return unsold goods in December, 1930, as constituting the conversion, is a far cry from the allegations of the amended petition after first appeal (N. R. 234) that all the goods were converted in February, 1925, because of having been placed in McCarthy's stock and offered for sale in the usual course of trade. Different facts, different alleged acts of conversion, different dates, and different circumstances altogether. Yet respondents say that the only issue to be tried after the first appeal is the question of value.

We would earnestly ask of the Court that it not simply rely upon the conflicting statements of counsel but that it turn to N. R. pages 223 to 234, and read the petition on which the case was tried prior to first appeal, and then read the amendment to the petition following the first appeal, shown at N. R. pages 234 and 235. The Court cannot do this without saying that the theory of liability upon which Wynne sought recovery against McCarthy following the

first appeal and upon which the second judgment has been entered against McCarthy is entirely different than the theory of recovery at the first trial and upon which the first judgment was entered. If a reading of the petitions alone is not sufficient to satisfy the mind of this Court, we would respectfully ask that it turn to N. R. pages 202 to 205, where the various statements made by counsel for Wynne throughout the litigation with respect to the differences in the issues and the theory of the lawsuit before and after the first appeal are collected.

But one conclusion can be reached.

The Court may ask what defense could McCarthy have to the amended complaint charging conversion. Since the question of conversion has never been tried and no record made as to that issue, a discussion of McCarthy's defenses thereto would be beside the point here. That is what he is asking, an opportunity to present his defenses to the issue of conversion. Suffice to say, the record as made, sketchy as it is with respect to conversion, reflects several such defenses.

Second. Reply to Respondents' Point II.

Subsection (a) of respondents' Point II is a reiteration of the claim that there was no change in the character of the issues and of the action before and after the first appeal. This has been covered in our reply to respondents' Point I.

Under Subsection (b) of Point II, respondents urge

five reasons why they claim the action after the amendment was still a suit in equity.

Reason 1 (p. 20, resp. br.) assigns as a ground of equity jurisdiction the existence of an alleged fiduciary relationship. Reason 2 (p. 21, resp. br.) says fraud was charged. Reason 3 (p. 21, resp. br.) asserts that the suit is in the nature of a creditor's bill. Reason 4 (p. 22, resp. br.) recites that mutual accounts were involved. Reason 5 (p. 24, resp. br.) sets out that the account is long and complicated.

All of these reasons are disposed of by the authorities cited in the brief in support of the petition under Point A, Proposition I. Illustrative of the principle involved in the statement by this Court in the case of *Buzard* v. *Houston*, 119 U. S. 347, 30 L. ed. 451, as follows:

> "*In cases of fraud or mistake, as under any other head of chancery jurisdiction,* a court of the United States will not sustain a bill in equity to support only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received."

It is the nature of the relief asked that controls and not the incidental presence of elements that under other circumstances might be made the basis of equitable recovery.

Here following first appeal the only relief sought was a simple money judgment.

There is no merit to respondents' Reason 3, namely, that the suit is in the nature of a creditor's bill.

It is true that Wynne sought to and did attach a small lease interest of record in the name of G. L. Meholin, as alleged in paragraph 14 of the petition (OR 10), belonged to the defendant McCarthy, and that by reason thereof Meholin was made a party defendant. No issue was ever made of this feature. The oil payment contract standing in the name of McCarthy, referred to in the same paragraph of the petition and which was likewise attached, was amply sufficient to satisfy any and all amounts which might be found to be due plaintiff. Meholin was merely carried as a nominal party.

The petition does not purport to constitute a creditor's bill.

Appellees own authorities negative their present contention in this regard. See also *Hamilton* v. *Penny* (5th Cir.), 58 F. (2d) 761; *Ziska* v. *Ziska,* 20 Okla. 634, 95 Pac. 254; 21 C. J. S. 1082, sec. 45, notes 71-72; 14 Am. Jur. 698, sec. 39; *Stewart* v. *Manget* (Fla.), 181 So. 370. These authorities, including those cited by appellee, all set forth the requirements and exceptions with respect to creditor's bills, namely, (a) first exhausting legal remedies; (b) the fraudulent character of the conveyance to some third person which plaintiff seeks to have set aside; (c) first reducing the indebtedness of plaintiff to judgment; (d) showing that the debtor had no other property subject to attachment or garnishment; and (e) numerous other prerequisites of a creditor's bill. In the instant case the petition itself shows that McCarthy had other property standing in his own name subject to attachment, and which was in this very

case attached. An almost identical situation is presented in the Florida case of *Stewart* v. *Manget, supra.*

Third. Reply to Respondents' Point III.

Respondents contend that the stipulation waiving a jury on the first trial was in fact a contract instead of a stipulation within the meaning of the rule announced by the authorities cited by petitioners in their brief in support of the petition under Proposition II (petrs. br. pp. 31-33). Whether called a stipulation or a contract, the effect, so far as the rule announced in said cases is concerned, is the same. The case of *Burnham* v. *North Chicago Street R. R. Co.*, 88 Fed. 627, does not purport to distinguish between a stipulation waiving a jury and a contract waiving a jury, as respondents would have this Court to believe. What the court in substance said was that agreements dealing with the waiver of a jury in a legal proceeding subject to the control of the court, whether called agreements, stipulations, or contracts, are not like other contracts. A simple stipulation whereby two adverse parties each agrees to waive a jury is just as much a contract between the parties as if such stipulation or agreement contained numerous other considerations.

Counsel for respondents in their brief (resp. br., p. 26) contradict our statement to the effect that the stipulation or contract involved in the case of *Burnham* v. *North Chicago Street R. R. Co., supra,* involved mutual agreements other than the waiver of a jury trial. We too ask the

Court to refer to the stipulation involved in that case (88 Fed. at p. 627). The stipulation there involved was in writing. It not only provided for the waiver of a jury trial, but provided for the submission of the case upon an agreed statement of facts. This constituted a mutual contract or agreement just as much as did the stipulation in the instant case. The mere fact that the things agreed to in the stipulation in the Burnham case are different from the things agreed to in the stipulation in the instant case would make no difference.

We further point out to the Court that even though a contract between two parties is to be considered something different that a stipulation between such parties, nevertheless, even in the case of a contract, it must be treated and regarded in the light of the considerations for which it was made. The stipulation in this case (NR 8) recited as a consideration for such stipulation the fact that the case was at that time properly on the equity docket, by reason of which fact neither party had a right to a jury trial. The parties might be willing to waive a jury in an action for accounting based on a contract upon which both parties relied, whereas the defendant would not be willing to waive a jury in a case wherein he is charged with conversion, a tort, or with liability arising out of such tort. It certainly cannot be said that a plaintiff can induce a defendant to sign a stipulation or a contract waiving a jury in a case presenting certain issues, and then amend his petition so as to proceed upon entirely different issues and expect to enforce such original stipulation or contract. The attorney

for respondents, by affidavit filed with the stipulation as an exhibit attached to the motion for the appointment of the Special Master, stated under oath (OR 47) that "This suit is brought upon a written contract by the terms of which" etc. Thus it is clear that the parties were waiving a jury in a contract action for an accounting and did not have in mind any waiver of a jury in a tort action.

The other matters referred to in respondents' Point 3 are fully covered in petitioners' principal brief.

Respectfully submitted,

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